

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR -8 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0349-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
CLAYTON DANIEL WILLIS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091785

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Stephan McCaffery

Tucson
Attorneys for Petitioner

K E L L Y, Judge.

¶1 Petitioner Clayton Willis pled guilty to kidnapping and two counts of aggravated assault. Willis admitted he had a prior felony conviction, and the trial court sentenced him to concurrent sentences, the longest of which is fifteen years. Willis then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the court summarily dismissed. This petition for review followed. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶2 At an October 2009 settlement conference, the state informed Judge Howard Fell it would not be offering a plea agreement to Willis, and Willis’s attorney, Janet Altschuler, then advised the court, in her client’s presence, that he wished to enter a guilty plea to the charges in the indictment. The minute entry from that proceeding states, “The Court advises the defendant of the consequences of his request [to plead guilty].” At the change-of-plea hearing before Judge Deborah Bernini, Willis pled guilty to the charges in the indictment and to a prior felony conviction. At that hearing, Altschuler explained that she had “talked to [Willis] extensively about [the fact that] he ha[d] nothing to lose by going to trial . . . [b]ut that’s what he wants to do.” When the court asked Willis why he wanted to plead guilty he responded:

There’s a few reasons, Your Honor. I don’t want my wife and daughter to go through any of that any more than what they already have. And, two, I’m ready to go. And, three, there’s no plea in the case. But the main reason is my wife and my daughter. I just don’t want them to do that.

....

. . . Your Honor, I know I'm guilty. And I know what I've done. And I just want to accept responsibility for that and just get on, maybe some closure for my wife and my mother-in-law. She's been more of a mother to me than my own. And I just want to get on with it.

¶3 Willis also provided the trial court with the names and dosages of the current medications he was taking for his mental health issues. When the court asked him if he felt "clear headed," he responded, "Yeah, I feel okay." Willis told the court he had discussed entering a guilty plea "fully" with his attorney, and the court responded, "I'm not going to stop him if he's clear headed and that's what he wishes to do." Altschuler then stated, "I can't stop him either. And I will tell you my advice is you have nothing to lose by going to trial."

¶4 Before accepting the factual basis for the plea, the court informed Willis of the sentencing ranges, and explained that by pleading guilty he was giving up the right to a jury trial; to be represented by an attorney, who would cross-examine the state's witnesses; to a direct appeal; and to remain silent. Willis assured the court he understood the consequences of his decision to plead guilty and that he was acting of his own "free will" after having discussed his decision "at length with [his] attorney." Willis provided a factual basis for his guilty plea. On the night of the incident, he had not been taking his medication "for a while." He "lost [his] temper" and "took it out on [his] wife," breaking her nose and inflicting blows that resulted in a brain injury. He then drove her from Tucson to Casa Grande and back again, before permitting their daughter to take her to a hospital.

¶5 Willis claims the trial court abused its discretion by denying post-conviction relief on the following claims: the court failed to fully inform him at the change-of-plea hearing of the rights he was waiving by pleading guilty; he was not competent to plead guilty when the change-of-plea hearing took place; and he is entitled to file a delayed appeal because his failure to file a timely appeal was through no fault of his own. Willis also claims he is entitled to an evidentiary hearing.

¶6 Willis first argues the trial court failed to fully advise him of the rights he was waiving by pleading guilty. He cites the court's failure to advise him of his right to testify and present evidence on his own behalf, the right to compel the attendance of witnesses, and the right to be presumed innocent until proven guilty beyond a reasonable doubt. Indeed, the court did not specifically inform Willis of these rights at the change-of-plea hearing. However, if a pleading defendant is advised of the constitutional privilege against self-incrimination, the right to a jury trial, and the right to confront his or her accusers, the court's failure to notify the defendant of other rights will not invalidate the plea. *See State v. Miller*, 110 Ariz. 304, 306, 518 P.2d 127, 129 (1974). "The acceptance of a guilty plea waives the constitutionally protected rights to a jury trial and to confront one's accusers and the privilege against self-incrimination." *State v. Murdaugh*, 209 Ariz. 19, ¶ 33, 97 P.3d 844, 852 (2004), *citing Boykin v. Alabama*, 395 U.S. 238, 243 (1969). "[T]he trial court must determine whether the plea was entered voluntarily, knowingly, and intelligently and whether the defendant was competent to enter a plea agreement." *Id.*; Ariz. R. Crim. P. 17.3. Rule 17.2, Ariz. R. Crim. P., requires only that the court determine the defendant understands the following before

accepting a guilty plea: the nature of the charges to which he or she is pleading guilty; the nature and range of the possible sentences on the charges; the constitutional rights which the defendant is giving up by pleading guilty; that he or she has the right to plead not guilty; and that pleading guilty waives the right to a direct appeal.

¶7 After advising Willis of those rights, as required by law, the trial court found his guilty plea, made in open court and in the presence of his attorney, to be “knowingly, intelligently and voluntarily made.” The record of the change-of-plea hearing supports the court’s finding.¹ In addition to informing Willis of the sentencing range and the rights he gave up by entering a guilty plea—the right to a jury trial, to representation by an attorney, to remain silent, and to a direct appeal—the court also assured that Willis understood the consequences of his guilty plea despite his mental health issues. In addition, Willis provided a concise and clear factual basis for the plea.

¶8 Although Willis correctly asserts the trial court did not address every possible right he was waiving, taken as a whole, it is clear Willis understood the consequences of pleading guilty. *Cf. Boykin*, 395 U.S. at 243 (court cannot presume

¹In support of his argument, Willis asks us to consider the transcript of the October 2009 settlement conference before Judge Fell. The minute entry from that hearing indicates the “Court advise[d Willis] of the consequences of his request [to plead guilty],” a fact Willis disputes. Although the trial court denied Willis’s request to order the transcript of that hearing as part of the Rule 32 record below, a copy of that transcript, entitled “Supplemental Record in Support of Petition for Review from Denial of Post-Conviction Relief,” has been included in the record before us on review. To the extent the transcript was not part of the record that was before the trial court, it is not properly before us. *See* Ariz. R. Crim. P. 32.9(c). In any event, we infer the court denied Willis’s request to order the transcript of the settlement conference because the only relevant evidence the court needed to determine whether Willis’s guilty plea was voluntary, knowing and intelligent was the transcript from the change-of-plea hearing.

valid waiver of jury right from silent record). Willis has not convinced us the court erred by failing to mention the specific rights about which he complains, or that he would have gone to trial instead of pleading guilty if the court had informed him of those rights. Nor has he asked to withdraw his guilty plea. The record supports the court's finding that Willis's plea was knowing, intelligent and voluntary, and Willis has presented nothing in his petition for post-conviction relief to contradict that record. Therefore, the court properly denied this claim.

¶9 Willis next claims he was not competent to plead guilty and that the trial court abused its discretion by denying post-conviction relief on this claim. He asserts the court was required, at the very least, to conduct an evidentiary hearing in light of subsequent evidence showing he was not competent to plead guilty at the time of the change-of-plea hearing. In support of this claim, Willis submitted the report of psychiatrist Barry Morenz, prepared in June 2010, nine months after Willis pled guilty. In his report, Morenz opined that even though Willis reported he was “emotionally stable” at the change-of-plea hearing, Willis “probably did not fully understand his legal options at the time he entered into the plea . . . and was not competent to enter into the plea,” and “there is substantial indication that Mr. Willis was not competent to make informed legal choices at his change[-]of[-]plea hearing and at the time he was sentenced.”

¶10 We review a trial court's determination that a defendant is competent to plead guilty for an abuse of discretion, and look for “reasonable evidence” to support the court's competency determination. *State v. Djerf*, 191 Ariz. 583, ¶ 35, 959 P.2d 1274,

1285 (1998), quoting *State v. Brewer*, 170 Ariz. 486, 495, 826 P.2d 783, 792 (1992). We view the evidence in the light most favorable to sustaining the court’s finding. *State v. Bishop*, 162 Ariz. 103, 105, 781 P.2d 581, 583 (1989). The record supports the court’s finding that

[n]othing at the hearing . . . suggests that [Willis] was confused or did not understand the rights he was waiving. Although competency was never raised by defense counsel, the Court was aware of [Willis]’s mental health issues and ensured that the plea hearing was not rushed and that [Willis] had the time he needed to make such an important decision.

¶11 As previously noted, the record shows that Willis told the trial court why he wanted to plead guilty, demonstrated that he was well-informed about his medications, and stated he had been advised by counsel and understood the ramifications of pleading guilty. Although the court did not refer to Morenz’s report in its ruling denying post-conviction relief, we infer the court considered that report along with its own recollection of Willis’s behavior at the change-of-plea hearing, as well as considering the presentence report, which also addressed Willis’s mental health issues. Additionally, as the court noted in its ruling denying post-conviction relief, Altschuler did not question Willis’s competency, despite her apparent disagreement with his decision to plead guilty. In fact, at the sentencing hearing, Altschuler stated that Willis had injured his wife when he was not taking his medication, but “[h]e is back on his medication here at the jail”; the presentence report also confirmed this statement. Furthermore, at sentencing the court told Willis it had considered “all the factors that your lawyer has again argued to me, the mental health issues, your remorse for what you did, your acceptance of responsibility,

pleading to the indictment.” Therefore, viewed in the light most favorable to the court’s ruling, the court did not abuse its discretion by denying Willis’s claim that he had not been competent to plead guilty.

¶12 Finally, Willis argues he failed to timely file an appeal through no fault of his own. *See* Ariz. R. Crim. P. 32.1(f). He contends he is entitled to file a delayed appeal because the trial court had informed him incorrectly that he had waived the right to appeal by pleading guilty. Citing A.R.S. § 13-4033(B), which precludes a direct appeal “from a judgment or sentence that is entered pursuant to a plea agreement,” Willis asserts he is, in fact, entitled to file an appeal because he did not plead guilty pursuant to a plea agreement. Comparing the statute to Rule 17.1(e), Ariz. R. Crim. P., which provides that any defendant who pleads guilty waives the right to a direct appeal, Willis argues the more specific language in the statute controls over the broader language in the rule. Asserting that he did not forfeit his right to a direct appeal because he did not plead guilty pursuant to a plea agreement, Willis contends he now is entitled to file a delayed appeal, and that the court abused its discretion by rejecting this argument below.

¶13 Constitutional rights, including the right to appeal, *see* Ariz. Const. art. II, § 24, may be waived, as long as the waiver is knowing, voluntary, and intelligent. *See State v. Wilson*, 174 Ariz. 564, 567, 851 P.2d 863, 866 (App. 1993). Responding to a defendant’s assertion that the right to appeal is inviolate, the Michigan Court of Appeals in *People v. Rodriguez*, 480 N.W.2d 287, 291 (Mich. Ct. App. 1991), said:

We find ironic the notion that an accused may waive the constitutional right to counsel, the right against self-incrimination, and the right to be free from unreasonable

searches while held in the oft-perceived coercive atmosphere of the police station, but may not stand with counsel in open court and waive the right to appeal.

¶14 Although Willis is correct that § 13-4033(B) substantively precludes a direct appeal from a judgment or sentence entered pursuant to a plea agreement, limiting such individuals to appellate review under Rule 32, we nonetheless find that Rules 17.1(e) and 17.2(e), which state that all pleading defendants waive the right to appellate review, do not conflict with the statute. Importantly, the record here shows that Willis not only waived his right to appeal at the change-of-plea hearing, but he also signed a “Notice Of Rights Of Review After Conviction” indicating he understood he did “not have a right to appeal if [he] . . . pleaded guilty.” Therefore, assuming without deciding, that a defendant who pleads guilty without a plea agreement is entitled to a direct appeal, the statute does not take away that which the rule acknowledges, specifically, that a pleading defendant can waive the right to appeal, as long as that waiver is knowing and intelligent. *See* Ariz. R. Crim. P. 17.1(e) and 17.2(e).

¶15 In addition, we reject Willis’s unsupported contention that § 13-4033(B) somehow prohibited him from waiving his right to appeal. We also reject Willis’s suggestion that he is entitled to relief because the trial court did not address specifically his argument regarding § 13-4033(B) in its ruling denying post-conviction relief. Even assuming, without deciding, that the court erroneously had informed Willis that he did not have the right to appeal, for all of the aforementioned reasons we infer the court considered and rejected Willis’s argument that § 13-4033(B) required the court to rule in his favor.

¶16

For all of these reasons, we grant the petition for review but deny relief.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge